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No. 97-300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY STEWART, Director,
Arizona Department of Corrections, et al.,
Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the limitations on second and successive petitions in 28 U. S. C. § 2244(b) apply to competency for execution claims?

2. Would applying the Act to prevent consideration of a claim of incompetency for execution, which is raised in a second or successive habeas corpus petition, constitute a violation of the Suspension Clause?

3. By what means can this Court review these issues?

4. Does a federal habeas court have subject matter jurisdiction to determine competency for execution?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's evasion of the successive petition limits established by Congress is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

September, 1997

Respectfully submitted,

KENT S. SCHEIDEGGER

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Fifteen years ago, Ramon Martinez-Villareal murdered Jim McGrew and Fernando Estrada.[1] He stated later that he killed them "because of his pure balls, that he was very macho." *State* v. *Martinez-Villareal*, 702 P. 2d 670, 673 (Ariz. 1985). He was convicted of these murders and sentenced to death. The Arizona Supreme Court affirmed. *Id.*, at 681, cert. denied *sub nom. Martinez-Villareal* v. *Arizona*, 474 U. S. 975 (1985).

Subsequent proceedings through April of 1996 are described in the Ninth Circuit's previous opinion, *Martinez-Villareal* v. *Lewis*, 80 F. 3d 1301, 1304-1305 (1996):

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

1. State post-conviction review (PCR), denied April 18, 1986.

2. State supreme court review of the denial, denied June 9, 1986.

3. A federal habeas petition, denied for containing unexhausted claims.

4. A second federal habeas petition, on which a stay of execution was issued June 10, 1986 to exhaust state remedies.

5. A second state PCR, denied July 12, 1988.

6. Review of the second state PCR denied by the Arizona Supreme Court.

7. Certiorari on the second state PCR, denied. *Martinez-Villareal* v. *Arizona*, 493 U. S. 874 (1989).

8. A third federal habeas petition, including for the first time a claim of incompetence to be executed, dismissed as unexhausted in 1991.

9. A third state PCR, denied August 13, 1991. The competency to be executed claim was denied on the ground that PCR was not the correct procedure for such a claim. See 80 F. 3d, at 1307.

10. Review of the denial of the third state PCR, denied April 7, 1992.

11. Certiorari on the third state PCR, denied October 5, 1992. *Martinez-Villareal* v. *Arizona*, 506 U. S. 893.

12. A fourth federal habeas petition, filed March 25, 1993.

The District Court then withdrew its prior dismissal orders, denied relief on the guilt phase, granted relief on the penalty phase, and held the incompetency claim to be premature. The Ninth Circuit affirmed on guilt and reversed on penalty, thereby reinstating the judgment. The competency holding had not been challenged on appeal. 80 F. 3d, at 1309.

13. This Court denied certiorari to review the Ninth Circuit's decision December 9, 1996. *Martinez-Villareal* v. *Lewis*, 136 L. Ed. 2d 517, 117 S. Ct. 588.

14. This year, Martinez-Villareal finally invoked the procedure established by Arizona for adjudicating competency claims, Ariz. Rev. Stat. Ann. §§ 13-4021 to 13-4024. After four days of testimony, the trial judge held he was competent. Combined Alternative Petition 2.

15. On May 16, 1997, the Arizona Supreme Court upheld this ruling. *Ibid.*

16. The same day, the federal district court denied Martinez-Villareal's motion to reopen the prior habeas proceeding, holding that such reconsideration was precluded by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 630 (CA9 1997) (*per curiam*).

17. On May 20, 1997, this Court denied certiorari to review the state competency holding. *Martinez-Villareal* v. *Arizona*, 137 L. Ed. 2d 1044, 117 S. Ct. 1840 (1997).

The present proceeding involves two applications. Martinez-Villareal moved in the Ninth Circuit for permission to file a successive habeas petition, 118 F. 3d, at 629, and presented an original habeas petition to Circuit Judge Nelson of that court. *Id.*, at 634. The Ninth Circuit panel dismissed the former as unnecessary and transferred the latter to the District Court. *Id.*, at 634-635.

Terry Stewart, Director of the Arizona Department of Corrections, respondent in the court below, has petitioned this Court for relief in several alternative forms, due to the uncertainty as to which form is appropriate and available in this situation.

SUMMARY OF ARGUMENT

Petitioner has thoroughly presented the compelling case for review of the judgment below. *Amicus* CJLF will therefore limit this brief to three points, each of which requires only a short discussion.

First, the order to be reviewed here is the Court of Appeals transfer of the original habeas application to the District Court, not its statement that permission to file in the District Court was unnecessary. The order to be reviewed falls within this Court's ordinary statutory certiorari jurisdiction.

Second, the decision below is not distinguishable from the Fifth Circuit's decision in *In re Davis*, filed after the filing of the present petition, on any rational basis. The ground on which *Davis* purported to distinguish the present case, that the inmate did not include a competency claim in his first petition, when it was unripe and could not be adjudicated, is a distinction without a difference.

Third, a claim of incompetency to be executed is neither a challenge to the fact or duration of custody nor an attack on the underlying judgment, and a federal court in habeas corpus lacks subject matter jurisdiction to adjudicate it.

ARGUMENT

I. Certiorari is an appropriate procedure to review the Ninth Circuit's transfer order.

Petitioner has requested several different modes of review of the Ninth Circuit's decision in this matter. Although the others are available if the Court deems necessary, *amicus* CJLF submits that the regular statutory writ of certiorari, 28 U. S. C. § 1254(1), is available and preferable.

As petitioner notes, see Combined Alternative Petition 21-22, the statutory prohibition on certiorari review of grant or denial of leave to file a successive petition is inapplicable. The

Court of Appeals neither denied nor granted the inmate's request, but declared permission unnecessary. *Id.*, at A-11; cf. 28 U. S. C. § 2244(b)(3)(E). The key point, though, is not the language of the opinion but the dispositive order of the Court of Appeals. See *Johnson* v. *De Grandy*, 512 U. S. 997, 1003, n. 5 (1994).

> "[W]e dismiss as unnecessary Martinez-Villareal's motion for authorization to file a petition for writ of habeas corpus in the district court. *We transfer the petition* presented to Judge D. W. Nelson on May 30, 1997 (Docket No. 97-80249) to the district court *pursuant to 28 U. S. C. § 2241(b).*" *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 634-635 (CA9 1997).

The latter subsection reads: "The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination *to the district court having jurisdiction to entertain it.*" (Emphasis added.)

If 28 U. S. C. § 2244(b)(3)(A) applies and is jurisdictional, as petitioner contends, then the transfer order was unauthorized. Furthermore, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Federal Rule of Appellate Procedure 22(a) as follows:

> "RULE 22. HABEAS CORPUS ~~PROCEEDINGS~~ *AND SECTION 2255 PROCEEDINGS* [Amended.]
>
> "(a) Application for the Original Writ.—An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application ~~will ordinarily~~ *shall* be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge ~~is not favored; the proper remedy is by~~ *shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code,* appeal to the *appropriate* court of appeals from the order of the district court denying the writ." (As amended Apr. 24,

1996, Pub. L. No. 104-132, § 103, 110 Stat. 1218, deleted language in ~~strikeout~~, added language in *italics*.)

If the second sentence applies and is jurisdictional, as *amicus* CJLF intends to argue if this case is accepted on the merits, neither Judge Nelson nor the Court of Appeals had jurisdiction to entertain the original writ petition at all. It should never have been filed.

Where no exception applies, this Court has jurisdiction to review via certiorari "[c]ases in the courts of appeals . . . (1) . . . before or after rendition of a judgment or decree." 28 U. S. C. § 1254; cf. *id.*, § 1257(a) (state courts, final judgments only). Certiorari jurisdiction thus turns on whether the case was "in" the Court of Appeals.

The first issue in this regard arises from the question of whether the case was *properly* in the Court of Appeals. That is, the successive petition limitations of the AEDPA are jurisdictional, and the court of appeals had no authority to act on a successive petition where their requirements were not met.

The rule on this issue is well settled. Where a lower court wrongly exercises jurisdiction, this Court has certiorari jurisdiction "not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986) (quoting *United States* v. *Corrick*, 298 U. S. 435, 440 (1936)).[2]

The second issue deals with the distinction between an application filed with a circuit judge and one filed in the Court of Appeals. Jurisdiction to entertain original habeas writs lies with circuit judges, not courts of appeals. 28 U. S. C. §§ 2241(a), 2254(a). From the final order of the circuit judge, an appeal lies to the Court of Appeals. *Id.*, § 2253. Therefore, there is no certiorari jurisdiction to directly review the order of

2. *Corrick* referred to appeal, rather than certiorari, but *Bender* applied its principle to a certiorari case.

the circuit judge. 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, pp. 18-19 (2d ed. 1988).

In the present case, though, the Court of Appeals did not observe this distinction. The court, not the individual circuit judge, exercised jurisdiction over the petition and made the transfer order. The case was therefore treated by the Court of Appeals as being in that court, whether it was properly there or not.

Here again, the principle stated in *Bender*, *supra*, applies. Whenever the Court of Appeals exercises jurisdiction, rightly or wrongly, the case is "in" the court of appeals for the purpose of this Court's certiorari jurisdiction to review the jurisdictional question. The Court of Appeals' action of transferring this case to the District Court without the finding required by 28 U. S. C. § 2244(b)(3)(C) is reviewable in this Court on statutory certiorari under 28 U. S. C. § 1254(1).

II. The decision in this case is not distinguishable from the decision of the Fifth Circuit in *Davis* on any rational basis.

Petitioner has already briefed the conflict between the Eleventh and Ninth Circuits, a conflict acknowledged by the latter. See *Martinez-Villareal* v. *Stewart*, 118 F. 3d 628, 632, n. 4 (1997). Since the filing of the petition, the Fifth Circuit has spoken on the question. Although the conflict is not as stark, the Fifth Circuit case is not distinguishable on any rational basis.

In re Davis, No. 97-00312, 1997 U. S. App. LEXIS 22736 (CA5, Aug. 27, 1997) was a motion for permission to file a second habeas application based on a claim that petitioner was incompetent to be executed. *Id.*, at *2-*3.

Davis held that 28 U. S. C. § 2244(b) applies to competency claims and barred Davis' claim. *Id.*, at *11-*13. This was so even assuming "that Davis is seeking to assert his *Ford* claim at the first properly available opportunity." *Id.*, at *12. *Davis*

also rejected the constitutional attack on the statute, following *In re Medina*, 109 F. 3d 1556, 1564 (CA11 1997).

Davis noted the decision in the present case but purported to distinguish it on the ground that Davis had not claimed incompetence to be executed in his first petition, a petition filed when execution was not imminent. 1997 U. S. App. LEXIS, at *7-*8.

This purported distinction makes no sense. "The law does not require the doing of a futile act." *Ohio* v. *Roberts*, 448 U. S. 56, 74 (1980). If *Davis* and the present case are both correct, then an inmate who files a pointless claim, which *must* be dismissed, *Martinez-Villareal*, 118 F. 3d, at 633, in his first federal petition gets a federal reconsideration of his competency later, while the inmate who quite properly declines to file a frivolous claim does not and is limited to state remedies. This cannot be right. Such a rule would be irrational.

While *Davis* may have avoided a head-on collision with the present case, the tension between the two opinions nonetheless calls for resolution on certiorari. Two opinions which reach opposite results on facts which make no rational difference create an anomaly in the law just as bad, if not worse, than an outright split of authority.

III. A habeas court lacks subject matter jurisdiction to review competency to be executed.

Questions of subject matter jurisdiction are not waivable and must be considered *sua sponte* if not raised by the parties. *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702 (1982). The fact that a court exercised jurisdiction in a prior case without discussing the issue does not establish a binding precedent that jurisdiction exists. *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 63, n. 4 (1989); *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U. S. 88, 97 (1994).

In *Fierro* v. *Gomez*, 77 F. 3d 301, 306 (CA9 1996), vacated on other grounds in *Gomez* v. *Fierro*, 136 L. Ed. 2d 204, 117 S. Ct. 285 (1996), the Ninth Circuit held that *method* of execution claims may be brought under 42 U. S. C. § 1983. That decision undercuts the exercise of habeas jurisdiction in a *competency* to be executed case.

The line between habeas and § 1983 has sharpened since *Ford* v. *Wainwright*, 477 U. S. 399 (1986). *Heck* v. *Humphrey*, 512 U. S. 477 (1994) and *Edwards* v. *Balisok*, 137 L. Ed. 2d 906, 117 S. Ct. 1584 (1997) strongly imply that the two remedies are mutually exclusive. A challenge to the conviction and sentence must be brought in habeas, and until it is set aside, no action lies under § 1983 for a claim inconsistent with the validity of the judgment. *Heck*, 512 U. S., at 486-487; *Edwards*, 137 L. Ed. 2d, at 915, 117 S. Ct., at 1589.

The Ninth Circuit held in *Fierro* that method of execution claims are analogous to conditions of confinement claims and therefore may be brought as § 1983 actions, whereas habeas is appropriate "whenever the requested relief requires as its predicate a determination that a sentence currently being served is invalid or unconstitutionally long." 77 F. 3d, at 305 (quoting *Young* v. *Kenney*, 907 F. 2d 874, 876 (CA9 1990)). If that is correct, a competency-to-be-executed claim does not fall within the habeas jurisdiction at all. Such a claim is neither an attack on the legality of custody, the subject of habeas at common law, see *Ex parte Watkins*, 3 Pet. 193, 202 (1830), nor a collateral attack on the criminal judgment, the typical function of the writ today. See *Felker* v. *Turpin*, 135 L. Ed. 2d 827, 840, 116 S. Ct. 2333, 2340 (1996).

However, it does not follow that every death row inmate could bypass state procedures and file his competency claim in federal court. Substantively, Justice Marshall's opinion in *Ford* is only a plurality in parts III, IV, and V. See *Ford*, 477 U. S., at 401. The controlling opinion is the one concurring in the result on the "narrowest grounds." See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). Justice O'Connor's opinion in *Ford*

states expressly that inadequacy of state remedies is an essential element of Ford's case, 477 U. S., at 427 (opinion concurring in the judgment in part), and Justice Powell's opinion implies as much. *Id.*, at 427 (opinion concurring in part and concurring in the judgment).

Procedurally, while § 1983 suits are not subject to an exhaustion requirement, *Heck*, *supra*, 512 U. S., at 489, they are subject to the abstention doctrine of *Younger* v. *Harris*, 401 U. S. 37 (1971). As a general rule, federal courts do not enjoin ongoing state proceedings. *Id.*, at 45. Ongoing proceedings include execution of judgments. *Hill* v. *Martin*, 296 U. S. 393, 403 (1935) (under Anti-Injunction Act). The Full Faith and Credit Act applies to § 1983 actions, giving state court judgments the same preclusive effect as they would have in a subsequent action in state court. *Allen* v. *McCurry*, 449 U. S. 90, 96 (1980); 28 U. S. C. § 1738.

Under this analysis, in any state which has an adequate procedure for determining competency, the federal courts would not interfere. They would either abstain under *Younger* or deny relief on the ground that one of the elements of the claim, inadequacy of state process, is missing. Once the state court determines, *with* due process, that the inmate is indeed competent, that finding would be res judicata, and again the federal court would not interfere. Federal intervention remains available as a last resort where there is no adequate state process. See, *e.g.*, *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973).

These are weighty jurisdictional issues of great importance. They involve matters of life and death, and they go to one of the most sensitive areas of relations between the state and federal courts. They are worthy of this Court's review.

CONCLUSION

A writ of certiorari should be granted.

September, 1997

Respectfully submitted,

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